STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 26, 2005
v	No. 252188 Oakland Circuit Court
CHARLES WAYNE FRANCISCO, Defendant-Appellant.	LC No. 03-189882 FH

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

The jury convicted defendant of first-degree home invasion, MCL 750.110a(2). He and a codefendant had separate juries. The court sentenced defendant to 8.5 to 40 years as a habitual offender who committed a third offense. MCL 769.11. He appeals as of right and we affirm.

I. FACTS

Defendant was tried along with co-defendant Chris Bernier, Jr. before separate juries. On April 4, 2003, defendant and Bernier entered the trailer of Joanne Oritz wearing masks and dark clothing. One of the men had a gun and threatened to kill Oritz and her two acquaintances if they did not sit down. Defendant and Bernier then took two purses from the women and left. Police later found a card bearing Oritz's name in defendant's back pocket.

II. JUROR VOIR DIRE

Defendant claims that the trial court erred in its allegedly inadequate voir dire of a juror who once worked for the court as a probation officer. We disagree.

A. Standard of Review

Whether the trial court conducted a sufficiently probing voir dire to uncover potential juror bias is reviewed for an abuse of discretion. *People v Tyburski*, 445 Mich 606, 609; 518 NW2d 441 (1994) "[W]here the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised." *Id.* at 619.

A trial court has considerable discretion in both the scope and conduct of voir dire. MCR 6.412(C). A defendant has no right to specific measures affecting the scope and conduct of voir dire, such as allowing counsel to ask the questions or sequestering individual jurors. *Id.* But a court does abuse its discretion if it conducts voir dire in a manner that does not adequately question jurors about potential bias such that a defendant may not intelligently exercise challenges for cause and peremptory challenges. *Id.* Such was not the case here.

B. Analysis

Defendant's argument that the voir dire was inadequate is unpersuasive because his reliance on *Tyburski* is misplaced. Several important facts distinguish that case. *Tyburski* was a high-profile murder trial subject to extensive media coverage, which gave the court "a duty to exercise caution in the manner it conducted voir dire." *Id.* at 624. All but two of the thirty-seven potential jurors called for questioning admitted exposure to the media coverage, as did eleven of the twelve who decided the case. *Id.* at 612 n 1. The court denied the defendant's motion for individual sequestered voir dire and a probing questionnaire for all prospective jurors, stating that it conducts its own voir dire for all its trials. *Id.* at 611. The court did not allow the attorneys to ask follow-up questions other than specific written ones that the court would submit. *Id.* It deemed some of the written questions irrelevant and did not ask them. *Id.* at 616-617. The Court characterized as "subtle admonishment" some of the trial court's reaction to jurors who admitted bias. *Id.* at 612.

In contrast, no publicity surrounded defendant's trial. Defendant was allowed to pose questions to potential jurors. The court did not deem any of defendant's questions irrelevant and did not refuse to submit any of them. While it did cut off questioning for cause, it did so after defendant conceded that his argument for cause due to bias lacked merit. Finally, the court did not subtly admonish prospective jurors for anything. The juror twice stated that she could put her work experience as a probation officer behind her and be fair and impartial. Defendant was allowed to query her about some details of her employment history. Finally, defendant challenges the voir dire of one juror, not the whole pool as in *Tyburski*. Defendant here cannot fairly show that the court did not allow him to intelligently use his challenges.

The court also did not err when it denied defendant's request for additional peremptory challenges. This Court reviews a denial of a request for additional peremptory challenges for an abuse of discretion. *People v Howard*, 226 Mich App 528, 536; 575 NW2d 16 (1997). MCR 6.412(E)(2) gives the court discretion to grant additional peremptory challenges on a showing of "good cause." According to the staff comment, the rule is based on 3 ABA Standards for Criminal Justice (2d ed), Standard 15-2.6(a), which allows allocating additional challenges "when special circumstances justify doing so."

The record does not support a finding of either good cause or special circumstances. Again, no special publicity surrounded this case. See *People v King*, 215 Mich App 310; 544 NW2d 765 (1996) (upholding denial of more peremptory challenges in case where publicity was not unfairly biased and where biased jurors were dismissed for cause). No particular reason other than the fact that the juror was once a probation officer alarmed defendant. Nothing she said indicated any bias and she disavowed bias twice. Defendant had no right to another peremptory challenge and the court did not abuse its discretion in refusing to give him one.

III. CODEFENDANT TESTIMONY

Defendant also argues that the court erred when it did not exclude from his jury the testimony of his codefendant's witnesses, specifically codefendant's sister and father.

A. Standard of Review

Defendant had a separate jury and the issues presented to this Court involve both severance and a challenge to the admission of evidence. Inherent to the issue of severance is what evidence to allow before a defendant's jury. Either way, the standard of review for both severance and admission of evidence is abuse of discretion. *Koester v Novi*, 213 Mich App 653, 663; 540 NW2d 765 (1995) (admission of evidence); *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994) (severance).

B. Analysis

Hana sets out the necessary framework for considering defendant's claim of error. Though defendant was granted a separate jury, he objects to it hearing the testimony of co-defendant's witnesses. According to *Hana*:

> [I]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials . . . . While [a]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence, . . . a fair trial does not include the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant. [*Hana, supra* at 350 (quotation, citation omitted).]

The court noted that "spillover prejudice" inherent in every multiple defendant trial is not sufficient to warrant severance. *Id.* at 349. Instead, antagonistic defenses must be mutually exclusive such that "if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant." *Id.* at 350. Such a scenario does not exist in this case. Furthermore, the Court in *Hana* concluded that the defendant failed to show the violation of any rights where his jury was not "exposed to evidence that would have been barred from their consideration in separate trials." *Id.* at 360. Here, defendant does not contend that the testimony of his codefendant and his codefendant's sister and father was inadmissible.

The prejudice defendant claims is of the spillover variety. For example, he argues that his codefendant implied that defendant was guilty and that the fact of his testimony was prejudicial because defendant did not testify and juries want to hear from defendants. Most defendants in a multiple defendant trial could claim this kind of prejudice. The law requires more, which defendant cannot show. Defendant and codefendant both rested their defenses on theories of identification. Both defendants denied culpability but neither defendant accused the other and therefore, their defenses were not mutually exclusive. Furthermore, the court repeatedly and at different stages of trial instructed both juries only to consider only the evidence

as it related to their defendant. Absent a contrary showing, jurors are presumed to follow the court's instructions. See, e.g., *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). The court did not err in denying defendant's request to exclude from his jury codefendant's witnesses.

IV. SENTENCING

Finally, defendant challenges his sentence. Specifically, he disagrees with how two offense variables were scored.

A. Standard of Review

Interpretation of how the sentencing statutes apply to defendant is a question of law that this Court reviews de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004).

B. Analysis

Defendant maintains that insufficient evidence supported a finding of multiple victims. MCL 777.39(1) requires a score of ten for OV 9 if there were 2 to 9 victims. A victim is a person placed in danger of injury or loss of life. MCL 777.39(2)(a). Sufficient evidence supported the court's finding that there were at least two victims. Joanne Ortiz testified that the two men acted in concert when they entered the trailer and one pointed a handgun at her. He threatened to kill her if she didn't sit down. Sheila Mendoza and Rhonda Farmer were also present. The men took Ortiz and Farmer's purses. Mendoza also testified that one of the men threatened to hurt or kill the women present. She believed that one of the men carried a gun based on his body language though she did not actually see a gun. One of them threw a piece of crystal in the direction of Farmer and her, though no one was hit. The jury found beyond a reasonable doubt that defendant was one of the men.

The testimonial evidence provided sufficient basis for a score of ten points for OV 9. Three persons were verbally threatened with death or physical injury. The men were armed with a handgun. The crystal was another weapon that placed at least two of those present in danger of injury. Finally, the confined space of the scene of the crime, a trailer with only one exit with steps, and the nature of the crime of home invasion inherently put everyone inside the trailer at risk of death or injury, whether it came from a fired bullet or a flung piece of crystal.

Defendant's argument for OV 13 is also unavailing. OV 13 scores points for a continuing pattern of criminal behavior. MCL 777.43. Defendant received under MCL 777.43(1)(b) a score of twenty-five points for a pattern of crime involving three or more crimes against a person. He was convicted of three counts of manslaughter in 1986. The issue on appeal is whether those three convictions should count as part of a continuing pattern. Time is the relevant consideration. According to MCL 777.43(2)(a):

> For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

Defendant says that the statute requires that his past felony convictions must have occurred within five years of his present home invasion offense. The prosecution's position is that the statute authorizes the scoring of points for crimes committed during any five-year period.

Case law settles this question in favor of the prosecution. According to this Court:

> The statute clearly refers to "a 5-year period." The use of the indefinite article "a" reflects that no particular period is referred to in the statute. Had the Legislature intended the meaning defendant assumes, the statute would refer to "the 5-year period immediately preceding the sentencing offense." Instead, the phrase "including the sentencing offense" modifies "all crimes." That is, the sentencing offense *may* be counted as one of the three crimes in *a* five-year period. That does not, however, preclude consideration of a five-year period that does not include the sentencing offense. [*People v McDaniel*, 256 Mich App 165, 172-173; 662 NW2d 101 (2002) (emphasis in original).]

Like defendant in this case, the defendant in *McDaniel* had three convictions from the 1980s that factored into his sentencing though his current offense happened many years later. *Id.* at 173. Though *McDaniel* involved past crimes that happened separately and were crimes against property and not persons as in this case, these factual distinctions do not require or even allow a different legal outcome. Simple application of *McDaniel* required the trial court to score twenty-five for OV 13.

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette